COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP41 **Cir. Ct. No. 2007CV2070**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

INDEPENDENCE CORRUGATED, LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF OAK CREEK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. This is an equitable estoppel case presenting the question whether Independence Corrugated reasonably relied to its detriment on conduct by the City of Oak Creek. Specifically, Independence argues that it lost out on a significant state tax benefit because it relied both on an incorrect tax form

provided by the City and on the City mayor's assurances that he was working to correct the problem and that Independence should be "optimistic." We agree with the City and the circuit court that, as a matter of law, Independence cannot show that its reliance on the City's conduct was reasonable. Accordingly, we affirm the circuit court's judgment dismissing Independence's claims against the City.

Background

¶2 Independence manufactures "corrugate." Most of Independence's equipment is directly related to manufacturing. In 2004, Independence located its facility in Wisconsin, in significant part, because its manufacturing assets would be exempt from personal property tax pursuant to WIS. STAT. § 70.11(27) (2005-06).[1]

¶3 In early 2005, a city employee provided Independence with a tax form for companies that may not take advantage of the manufacturing exemption, even though "the City of Oak Creek knew" that Independence was a manufacturing company. The summary judgment materials do not tell us who the employee who provided the form was. Independence relied on this action by the City and submitted the incorrect form. As a result, over $11 million in Independence assets were incorrectly subject to personal property tax for 2005, resulting in a tax overpayment of approximately $207,000.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Independence learned in July 2005 that the City provided the incorrect form. Independence notified the City of its mistake and asked the City to assist in having the 2005 tax adjusted.

¶5 The City did not dispute that it provided Independence with the incorrect form. Additionally, the City's mayor provided Independence with assurances that he was working on the situation and that Independence should be "optimistic" about an adjustment. Independence relied on the mayor's assurances. In February 2006, however, the mayor informed Independence that he would not assist Independence.

¶6 Although the City collected the tax at issue, the parties agree that the State of Wisconsin Department of Revenue is the taxing authority that decides whether to assess property as exempt manufacturing property. They further agree that Independence could have appealed the incorrect assessment of its manufacturing property to the state board of assessors under WIS. STAT. § 70.995(8).

¶7 Independence sued the City for, among other relief, a judgment to cover the amount that Independence overpaid in 2005 taxes. The City moved for summary judgment, and asserted that Independence was responsible for submitting the correct form and could have timely appealed the State's decision but failed to do so. The City argued that Independence should have made its own inquiry into the proper procedures. Independence countered that its reliance on the City's actions was reasonable and that the City should, therefore, be equitably estopped from asserting that Independence was responsible for missing any deadlines.

¶8 The circuit court concluded that it was ultimately Independence's duty to file the proper tax forms and to comply with all tax laws. The court also concluded that it was not reasonable as a matter of law for Independence to rely on the incorrect form provided by the City. The court concluded, in the alternative, that Independence could not assert equitable estoppel against the City based on the incorrect form because equitable estoppel can be asserted against a government entity only if the government conduct is so egregious as to be "tantamount to fraud." Finally, the court concluded that Independence's estoppel theory failed with respect to the mayor's assurances because, so far as the parties' summary judgment materials and oral arguments revealed, any assurances made by the mayor occurred after the deadline for Independence to challenge the 2005 tax.

¶9 Accordingly, the circuit court granted the City's motion for summary judgment, and dismissed Independence's action against the City. Independence appealed.

Discussion

¶10 Initially, we note that the parties dispute whether Independence is attempting to use equitable estoppel improperly, as the *basis* for a claim as opposed to a *defense* to a claim. *See, e.g.*, ***Murray v. City of Milwaukee***, 2002 WI App 62, ¶15, 252 Wis. 2d 613, 642 N.W.2d 541 ("[E]quitable estoppel (estoppel *in pais*) is a bar to the assertion of what would otherwise be a right; it does not of itself create a right." (footnote omitted)). We do not resolve that dispute. Rather, we will assume that equitable estoppel is available to Independence, and we will examine whether Independence otherwise meets the requirements of equitable estoppel.

¶11 We review summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Suffice it to say here that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). We view the facts in the light most favorable to the nonmoving party. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986).

¶12 The parties dispute, as they did in the circuit court, whether the City should be equitably estopped from asserting that Independence, not the City, was responsible for Independence's failure to file the correct form or to timely appeal the determination of the 2005 tax. The parties' arguments make it apparent that they view the equitable estoppel issue as dispositive.

¶13 The basic elements of equitable estoppel are:

> "The defense of equitable estoppel consists of action or non-action which, on the part of one against whom estoppel is asserted, induces reliance thereon by the other, either in action or non-action, which is to his detriment. It is elementary, however, that the reliance on the words or conduct of the other must be reasonable and justifiable."

State v. City of Green Bay, 96 Wis. 2d 195, 202, 291 N.W.2d 508 (1980) (citations omitted). The party asserting equitable estoppel must prove it by "clear, satisfactory, and convincing" evidence. ***Nugent v. Slaght***, 2001 WI App 282, ¶29, 249 Wis. 2d 220, 638 N.W.2d 594.[2]

[2] Equitable estoppel is not applied as freely against government entities as it is against private persons and, in government cases, additional standards apply. *See, e.g.*, ***Beane v. City of*** (continued)

¶14 Independence argues that there are genuine issues of material fact for the fact finder regarding whether Independence reasonably relied on the City's conduct. We disagree. There are no disputes that prevent summary judgment. For purposes of summary judgment, we have assumed that all factual disputes will be resolved in favor of Independence. Even so, we conclude that Independence is unable to establish that its reliance on the City's conduct was reasonable. *See* ***Milas v. Labor Ass'n of Wis., Inc.***, 214 Wis. 2d 1, 8, 571 N.W.2d 656 (1997) ("When the facts and reasonable inferences therefrom are not disputed, it is a question of law whether equitable estoppel has been established.").

Sturgeon Bay, 112 Wis. 2d 609, 620-21, 334 N.W.2d 235 (1983). Based on those standards, Independence argues that the circuit court erred by concluding that the City's conduct had to be "tantamount to fraud," *see* ***State v. City of Green Bay***, 96 Wis. 2d 195, 203, 291 N.W.2d 508 (1980), and by failing to conduct a required balancing test, *see* ***Beane***, 112 Wis. 2d at 620-21. We need not reach these arguments because we conclude that Independence's assertion of equitable estoppel fails on at least one of the basic elements—reasonable reliance—regardless of any additional standards that apply in government cases.

With respect to Independence's balancing-test argument, we note that we are uncertain if Independence is arguing that courts must apply the balancing test in government cases even when equitable estoppel fails on the basic elements. If Independence is making that argument, we disagree. We recognize that there is language in some of the case law that might, when read in isolation, seem to support this argument. *See, e.g.*, ***DOR v. Moebius Printing Co.***, 89 Wis. 2d 610, 639, 279 N.W.2d 213 (1979) ("In each case the court must balance the injustice that might be caused if the estoppel doctrine is not applied against the public interests at stake if the doctrine is applied."). As we understand the thrust of the case law, however, the balancing test is an additional hurdle for the party asserting estoppel; the test need be applied only when the party is successful in showing the basic elements of equitable estoppel. *See* ***id.*** at 638 ("Because [we] conclude[] that the elements of the defense of estoppel against a private person are met in the case at bar, we must next consider whether the defense of estoppel shall be applied against a state agency."); ***Fritsch v. St. Croix Cent. Sch. Dist.***, 183 Wis. 2d 336, 345, 515 N.W.2d 328 (Ct. App. 1994) ("[W]e must first determine whether the elements of estoppel are met and, if so, whether it can be applied to the school district.").

City's Provision Of Incorrect Form

¶15 Independence argues that it reasonably relied on the City's provision of the incorrect tax form. Independence asserts that it was "a newly created business" with "no experience with the personal property tax process in Wisconsin." As such, Independence argues, it was reasonably justified in assuming that the City knew which type of form to provide. The City responds that it was unreasonable for Independence to place reliance on the City instead of conducting its own independent inquiry into the proper procedures for obtaining a tax exemption. We agree with the City.

¶16 Independence's affidavit in response to the City's motion for summary judgment shows that Independence's assets totaled more than $11.3 million.[3] And, the affidavit further states:

> Independence is a closely-held limited liability company owned by nine corrugated box companies, three of which are based in the State of Wisconsin. Independence was created in 2004 to acquire and operate a business to manufacture corrugate for sale and conversion by its owners.
>
> One of the major factors in Independence's decision to locate its facility in Wisconsin is that its manufacturing assets would be exempt from personal property tax pursuant to Wis. Stat. § 70.11(27). Because the vast majority of Independence's equipment is directly related to manufacturing, this exemption is extremely useful to Independence.

¶17 What these facts show is that Independence is a company with significant assets and that it is owned by nine corporate entities, three of which are

[3] Independence alleged in its complaint that it employs approximately seventy-one individuals.

existing Wisconsin companies. Independence was sufficiently sophisticated to form a special-purpose entity to further those companies' common business goals. The amount of tax at stake in 2005 was over $200,000. Perhaps most importantly, Independence or its owners chose to locate Independence in Wisconsin to take advantage of the state tax exemption for manufacturing property. As Independence states in its affidavit, Independence would have paid only $4,700 in personal property tax in 2005—instead of almost $212,000—if its manufacturing property had been assessed properly.

¶18 We cannot reconcile these facts with Independence's argument that it reasonably relied on the form sent to it by an unidentified city employee. Although that employee's mistake was sloppy at best, neither Independence nor any similarly situated company could have reasonably relied on a form provided by a city employee with unknown expertise to ensure that the company reaped a significant tax benefit that drove its decision to locate in Wisconsin, especially since the City is not the government entity that determines the benefit.[4] Given the stakes, and Independence's nature and size, Independence should have independently verified that it had the correct form. Independence has not argued that it took any such independent steps, and we conclude as a matter of law that its reliance was not reasonable.

¶19 Independence points to cases in which a taxpayer has been successful in using equitable estoppel against a taxing authority. *See* ***DOR v. Family Hosp., Inc.***, 105 Wis. 2d 250, 253, 257, 313 N.W.2d 828 (1982); ***DOR v.***

[4] Independence tells us nothing about the city employee who sent the form, nor does Independence claim that the employee's position or level of experience is a consideration that should weigh in Independence's favor.

Moebius Printing Co., 89 Wis. 2d 610, 632-33, 636-37, 641-42, 279 N.W.2d 213 (1979); ***Libby, McNeill & Libby v. Department of Taxation***, 260 Wis. 551, 554-60, 51 N.W.2d 796 (1952); ***Amtronix Indus., Ltd. v. LIRC***, 115 Wis. 2d 108, 110, 116-17, 339 N.W.2d 802 (Ct. App. 1983). All of these cases, however, are readily distinguishable.

¶20 In ***Amtronix***, the taxpayer relied on an individualized audit and "compliance report" by the taxing authority. ***Amtronix***, 115 Wis. 2d at 110 & n.1, 113, 117. Similarly, in ***Moebius Printing***, the taxpayer relied on an individualized field audit and follow-up letter from an agent of the taxing authority. ***Moebius Printing***, 89 Wis. 2d at 617, 628-29, 632-33, 636-37. In ***Family Hospital***, the taxpayer relied on the taxing authority's "Technical Information Memorandum," which was an "official interpretation of the statutes for the purpose of aiding the taxpayer in his compliance with the tax laws." ***Family Hospital***, 105 Wis. 2d at 252, 255, 259. Finally, in ***Libby***, the taxpayer relied on a supreme court decision and the taxing authority's acquiescence to that decision. ***Libby***, 260 Wis. at 554, 556, 560-61.

¶21 We think it self-evident that the provision of a form by a city employee who was not employed by the taxing authority with the power to grant the exemption Independence sought is materially different than the individualized determinations and legal authorities relied on by the taxpayers in ***Amtronix***, ***Moebius Printing***, ***Family Hospital***, and ***Libby***.

¶22 Independence asserts that the City knew Independence was a "manufacturer." Moreover, it can reasonably be inferred from Independence's affidavit that the City knew it was important to Independence to obtain the manufacturing exemption, and we agree with Independence that taxpayers are

entitled to "fair play" from government officials. *See* ***Moebius Printing***, 89 Wis. 2d at 640. None of this means, however, that it was reasonable for a company like Independence to rely on an unidentified city employee to ensure that Independence obtained a significant tax benefit from the State. *See* ***Monahan v. Department of Taxation***, 22 Wis. 2d 164, 168, 125 N.W.2d 331 (1963) ("Generally the right to assert estoppel *in pais* does not arise unless the party asserting it has acted with due diligence.").

Mayor's Assurances

¶23 Independence argues that it reasonably relied on the mayor's assurances that he was working on solving the problem and on the mayor's statement that Independence should be "optimistic" about an adjustment. Independence argues that it did not timely appeal the tax amount for 2005 under WIS. STAT. § 70.995(8) because it relied on the mayor's assurances. We reject this argument for the reasons that follow.

¶24 Initially, we observe that Independence fails to address the circuit court's conclusion that, so far as the parties' summary judgment materials and oral arguments revealed, any assurances by the mayor occurred *after* the deadline for Independence to appeal. Obviously, Independence could not have reasonably relied on the mayor's assurances as a reason for failing to timely appeal if those assurances occurred after the appeal deadline. Independence fails to tell us in its appellate briefing when the appeal deadline passed or precisely when the mayor made his assurances. This omission is fatal to Independence's argument. "The ultimate burden … of demonstrating that there is sufficient evidence … to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion." ***Transportation***

Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). Moreover, as the appellant, Independence bears the responsibility to demonstrate that the circuit court erred in concluding, in effect, that the record showed no genuine issue of material fact as to the timing of the mayor's assurances. Thus, we affirm the circuit court on this basis. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997) ("[W]e do not decide issues that are not adequately developed by the parties in their briefs."); *see also* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (court of appeals has neither duty nor resources to "sift and glean" the record for facts supporting a party's argument).

¶25 Moreover, even if we were to assume that the mayor made the assurances Independence describes at some point before the expiration of Independence's time to appeal, we would nonetheless conclude that Independence's assertion of estoppel fails on its merits. In reaching this conclusion, we take into account the same facts about Independence that we considered in rejecting Independence's argument regarding the incorrect form and, in addition, consider that the mayor's assurances fell far short of a promise. Furthermore, even if the mayor promised results, Independence does not suggest any reason why it could justifiably believe that the mayor possessed the power to deliver on such a promise. Under the circumstances, it was not reasonable for Independence to forgo appeal rights based on the mayor's assurances. Regardless of any promise from the mayor, it was simply not reasonable for Independence to forgo filing a timely appeal to the governmental entity empowered to grant the benefit Independence desired.

Conclusion

¶26 In sum, we conclude that, even if we assume that all factual disputes are resolved in favor of Independence, Independence cannot establish that its reliance on the City's actions was reasonable. Because we agree with the circuit court that equitable estoppel does not apply as a matter of law and that the City was entitled to summary judgment, we affirm the circuit court's judgment dismissing Independence's claims against the City.

By the Court.—Judgment affirmed.

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